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Supreme Court of the United States

OCTOBER TERM, 1931—No. 172.

MARINE TRANSIT CORPORATION and Tug "GERALD A. FAGAN" by MARINE TRANSIT CORPORATION, Claimant, Petitioner,

against

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, etc.

BRIEF OF MARINE TRANSIT CORPORATION, PETITIONER.

HORACE L. CHEYNEY,
Counsel for Petitioner.

CORPORATE PRESS, INC., New York City

INDEX.

	PAGE
REFERENCE TO OFFICIAL REPORTS OF THE OPINIONS BELOW	1
STATEMENT OF THE CASE	1
THE FACTS	2
THE PROCEEDINGS	3
STATEMENT OF ERRORS RELIED UPON	6
ARGUMENT.	
POINT I. The law before the enactment of the Arbitration Act	8
POINT II. The Arbitration Act is unconstitutional because it deprives the Federal courts of their judicial power and gives it to laymen	9
POINT III. The Court below erred in holding that Congress had the power to enlarge the jurisdiction of the admiralty courts by conferring upon them the equitable power of specific performance	15
POINT IV. The Court erred in holding that the provisions of Section 8 of the Act are independent of the other provisions of the Act, instead of construing the Act as a whole, and, it especially erred because Section 8 of the Act has no application to this case	18
POINT V. The decision of the Circuit Court of Appeals is in direct conflict with the terms of the Arbitration Act which provides in Section 9 that a judgment may be entered upon the award of arbitrators only if the parties have so agreed by their contract for arbitration	22

PAGE

POINT VI. The decision of the Court below that an admiralty court has jurisdiction to enforce the arbitration of a contract for intra-state carriage is erroneous because under Section 1 of the Act, the Courts have jurisdiction only over maritime transactions and contracts involving either interstate or foreign commerce 23

POINT VII. The Court below erred in holding that execution should issue against the stipulator for the tug, although no decree was entered against the tug, is clearly erroneous and is in conflict with the uniform law upon the subject 26

POINT VIII. The Court erred in holding it was not necessary that the award should be signed by all the arbitrators 27

Appendix.

THE UNITED STATES ARBITRATION ACT (in full) 31

Cases Cited.

	PAGE
Atlantic Mutual Ins. Co. v. Alexander, 16 Fed. 379 ..	27
Bakelite Corporation, Ex parte, 279 U. S. 438	14
Black Heath, The, 195 U. S. 361	16
Eclipse, The, 135 U. S. 599	15
Farrell v. Waterman S. S. Co., 291 Fed. 604	13
Harrison v. Hadley, 2 Dill. 229; Fed. Cases 6137	13
Hartford Accident Co. v. Southern Pacific Co., 273 U. S. 277	17
Hollins, In re, 220 Fed. 349	13
Jackson v. Steamboat Magnolia, 20 How. 296	12
Kline v. Burke Construction Co., 260 U. S. 226	15
Kynoch v. The S. C. Ives, New. 205; Fed. Cases 7598	15
Lottowanna, The, 21 Wall. 558	16
Manley v. Olney, 32 Fed. 708	13
Mayor, etc. v. Cooper, 6 Wall. 247	13
Morse Dry Dock v. Northern Star, 271 U. S. 552	17
Norwich & N. Y. Transportation Co. v. Wright, 13 Wall. 104	17
Red Cross Line v. Atlantic Fruit Co., 264 U. S. 1091	8, 15
Straugher & Johnson v. Phillips Bernard Co., 240 Fed. 131	13
United States v. Burlington, etc., 29 Fed. 331	13
Zip Mfg. Co. v. Pep Mfg. Co., 44 Fed. (2d) 184 ...	19, 24

Text Books Cited.

PAGE

Benedict's Admiralty, Vol. 2, pages 490, 491 27

Statutes Referred To.

ACT OF CONGRESS OF FEBRUARY 12, 1925, C. 213, SEC. 41:

Section 1..... 18, 19-24

Section 2..... 24

Section 4..... 15, 19, 21

Section 8..... 15, 19, 20, 21, 22, 23, 24

Section 9..... 19, 22

Section 10..... 9

Section 11..... 9

Supreme Court of the United States

October Term, 1931—No. 172.

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against

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, etc.

BRIEF OF MARINE TRANSIT CORPORATION, PETITIONER.

Reference to Official Reports of the Opinions Delivered in the Courts Below.

The opinion of the Circuit Court of Appeals by MANTON, *C. J.*, is reported under the title of The Gerald A. Fagan, 49 Fed. (2d) 215.

None of the decisions in the District Court is reported.

Statement of the Case.

This case concerns the constitutionality and construction of the Federal Arbitration of February 12, 1925, C. 213, Sec. 41; Title 9. U. S. Code of Law.

For convenience, we are attaching a copy of the Act as an appendix hereto.

The headings which are there inserted are not contained in the original act. They are taken from the United States Code Annotated and are inserted for convenience in reference.

The Facts.

It appears from the bill of lading (Marine Exhibit 3, p. 163, at pp. 164-165) that on July 28, 1928, Dreyfus & Company received at Buffalo, N. Y., in bond, for export, a shipment of grain from Fort William, Ontario, by the steamer *Pioneer*.

A lake bill of lading was issued, covering the carriage of the grain between Fort William and Buffalo (p. 165).

This grain was stored in the American elevator at Buffalo on July 28, 1928.

About three weeks later on August 17, 1928, Dreyfus & Company entered into a written agreement with the Marine Transit Company whereby the latter agreed to furnish insurable tonnage for carriage from Buffalo to New York, of about 200,000 bushels of wheat. (See Dreyfus Exhibit 1, p. 147). Dreyfus & Co. agreed to pay freight on the grain at the rate of 6¼¢ per bushel (p. 147). The contract provided that it should be subject to the New York Produce Exchange Grain Charter Party No. 1 as amended. (See p. 148.)

That form of Grain Charter contained the following provision: (Dreyfus Exhibit 2, p. 149, at p. 156):

> "DISPUTES: All disputes arising under this contract to be arbitrated before the Committee on Grain of the New York Produce Exchange whose decision shall be final and binding."

About September 13, 1928, 19,200 bushels of grain, part of the said shipment of 200,000 bushels, were loaded upon the boat *Edward A. Ryan* at Buffalo, which had been provided by the Marine Transit Corporation for the carriage of grain to New York under the aforesaid contract.

A bill of lading covering his shipment was issued. (See Marine Exhibit C, p. 163.)

The boat *Ryan* was placed in a fleet of boats, including the boat *John E. Enright*, which was taken in tow by the tug *Gerald A. Fagan*. While the boat *Ryan* and the other boats were in tow of the tugboat *Gerald A. Fagan* on the New York Barge Canal, some mishap occurred, in which the boat *Edward A. Ryan* sustained damage, in consequence of which it sank, with the cargo of wheat on board.

The Proceedings.

On December 14, 1928, Dreyfus & Company filed a libel in the Southern District of New York in admiralty against the Marine Transit Corporation, in *personam*, the tug *Gerald A. Fagan* in *rem* and the boat *John E. Enright* in *rem*.

This libel was in the common form of admiralty libels and asked only the relief usually prayed for in such libels.

It contained no prayer asking for arbitration.

A claim was made for the tug *Gerald A. Fagan*, by the Marine Transit Corporation, its owner, and a stipulation for value was filed by it, as claimant, in the sum of $26,000, with the Continental Casualty Company, as stipulator.

As the Marine Transit Corporation was sued only in *personam* no stipulation was required of it and none was ever given by it.

Answers were filed by the various respondents.

On August 20, 1929, the libellant made a motion for an order referring the disputes between the libellant and the Marine Transit Corporation, the tug *Gerald A. Fagan* and the barge *John E. Enright* to the Committee on Grain of the New York Produce Exchange for arbitration (p.

25c). After hearing, Coxe, *J.*, signed an order granting the motion as to the Marine Transit Corporation, only, and denying it to the tug *Gerald A. Fagan* and the barge *Enright* (p. 251).

On September 6, 1929, an order was entered resettling the order of August 28, 1929, and providing that the Marine Transit Corporation should submit to arbitration before the Committee on Grain of the New York Produce Exchange "any and all issues under the contract dated August 17, 1928, between the Marine Transit Corporation and Louis Dreyfus & Company for the transportation of 200,000 bushels of wheat from Buffalo to New York" (p 28).

Thereafter, under that order, the parties mentioned in it appeared before the Grain Committee of the New York Produce Exchange composed of five members (p. 30). Hearings were had before that committee of five members (p. 88) at which evidence on behalf of both parties was introduced.

On December 20, 1929, four of said committee signed an award in favor of the libellant and against the Marine Transit Corporation for the sum of $23,016 plus interest amounting to $1,668.66 (p. 166).

This award was not signed by Mr. Walter Trap, one of the members of the Grain Committee, who had taken part in the hearings. There is nothing in the record showing why the award was not signed by him.

Thereafter, on December 23, 1929, counsel for the libellant made a motion in the District Court to confirm that award (p. 167). Opposing affidavits were filed. After hearing, that motion was granted and a decree was entered confirming the award of the arbitrators and providing that the libellant should recover from the Marine Transit Corporation the sums mentioned in the award (p. 214).

Although the District Court had denied the motion to submit the issue as to the liability of the tug *Gerald A.*

Fagan to arbitration and although there had never been any hearing or trial as to its liability, nor any decree against it, nevertheless the decree above mentioned provided that execution should issue against the stipulation of the tug in the following language (p. 215):

> "Further ordered that unless the Marine Transit Corporation, respondent, cause payment to be made within ten days after service of a copy of this order, with notice of entry on proctors for respondent, execution issue against the Marine Transit Corporation and Continental Casualty Company, the stipulator for cost and value, their goods, chattels and lands, to satisfy this decree.

In other words, the Court decreed that execution should issue against the stipulator for the tug, although no decree was entered against it and solely on account of the decree against the Marine Transit Corporation in *personam*.

A motion was made for an order restraining the libellant from recovering from the claimant of the tug *Gerald A. Fagan* or its stipulators under the decree already mentioned (p. 216). After hearing, this motion was denied in a memorandum by CAFFEY, *J.* (p. 223).

A formal order was then entered denying the motion and further ordering that the libellant should recover "of and from the Marine Transit Corporation or its stipulators" (p. 226).

An appeal was taken from the decree of the District Court to the Circuit Court of Appeals which affirmed the decree of the Court below in an opinion by MANTON, *C. J.*

After that decision was handed down a conference was had between MANTON, *J.*, and the proctors for the various parties as to that portion of the opinion relating to execution against the stipulators of the tug *Gerald A. Fagan*.

Subsequently the following letter was received by counsel for the various parties:

UNITED STATES CIRCUIT COURT OF APPEALS
SECOND JUDICIAL DISTRICT

Chambers of
MARTIN T. MANTON,
U. S. Circuit Judge,
New York City

May 30, 1931

Dreyfus v. Marine Transit

Macklin, Brown, Lenahan & Speer, Esqs.,
Horace L. Cheyney, Esq.
New York City
Otto & Lyon, Esqs.,
George V. A. McCloskey, Esq.,
New York City

Gentlemen:

I have examined Mr. Cheyney's complaint as to the opinion in the above entitled case, and have decided to let it stand, without change or amendment.

Respectfully,

MARTIN T. MANTON
Circuit Judge.

Statement of Errors Relied Upon.

1. The Arbitration Act is unconstitutional because it deprives the Federal Courts of their judicial power and gives it to laymen.

2. The Court below erred in holding that Congress has the power to enlarge the jurisdiction of the admiralty courts by conferring upon them the equitable power of specific performance.

3. The Court below erred in holding that the provisions of Section 8 of the Act are independent of the other sections of the Act, instead of construing the Act as a whole; and it especially erred because Section 8 of the Act has no application to this case.

4. The decision of the Circuit Court of Appeals is in direct conflict with the terms of the Arbitration Act, which provides in Section 9 that a judgment may be entered upon the award of the arbitrators only if the parties have so agreed in their contract for arbitration.

5. The decision of the Court below that an admiralty court has jurisdiction to enforce arbitration of a contract for intra-State commerce is erroneous because under Section 1 of the Act, the courts have jurisdiction only over maritime transactions and contracts involving either interstate or foreign commerce.

6. The decree of the Court below that execution should issue against the stipulator for the tug although no decree was entered against the tug is clearly erroneous and is in conflict with the uniform law upon the subject.

7. The Court erred in holding that it was not necessary that the award should be signed by all the arbitrators.

ARGUMENT.

POINT I.

The law before the enactment of the Arbitration Act.

At the inception of the argument, a general statement of the law of arbitration prior to the enactment of the Federal Arbitration Act may be of value in connection with the points subsequently raised.

The old law upon this subject is very fully considered in the opinion of this Court delivered by Mr. Justice BRANDEIS in *Red Cross Line* v. *Atlantic Fruit Company*, 264 U. S. 109.

The following principles of law were there set forth

1st: That no action will lie in equity for the specific performance of an agreement for arbitration.

2nd: That an action at law will lie for damages for breach of contract for arbitration.

3rd: An action at law will lie to recover amount of the award of arbitrators.

4th: A Court of admiralty can not order specific performance of a contract.

POINT II.

The Arbitration Act is unconstitutional because it deprives the Federal Courts of their judicial power and gives it to laymen.

The right to hear and determine the merits of a pending cause is an important part of the judicial power.

This Act takes away from the district courts power to hear and determine the merits of causes pending before them.

The Act converts them into ministerial officers to give effect to the award of a non-judicial body.

The only power given to any Court, over the award of arbitrators, is to set it aside for fraud, etc., under Sec. 10 or to correct errors in it under Section 11.

As we shall point out hereafter the effect of the decision of the Circuit Court of Appeals is that the provisions of sections 10 and 11 have no application to proceedings in admiralty and therefore in those proceedings, under the decision below, a court of admiralty can not set aside or correct the award for any reason, but can only enter a decree upon it.

Section 1 of Article 3 of the Constitution, provides as follows:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Section 2 of Article 3 of the Constitution provides that the judicial power shall extend "to all cases of admiralty and maritime jurisdiction."

It is clear, under the provisions of Section 1 of Article 3, that Congress cannot vest any judicial power under the

Constitution in any body other than a court duly created under the provisions of the Constitution.

It is well settled that there can be no delegation of the judicial power of the federal courts either by the courts themselves, or by Congress.

The question of the constitutionality of the Arbitration Act may be approached from two points of view.

In the first instance, the Act may be regarded as an attempt to delegate the judicial power of the courts, and to deprive them of that power and, in the second instance, it may be regarded as an attempt to confer judicial power upon some body other than a court.

From either point of view, the Act would seem to be unconstitutional.

The right to hear and determine is of the very essence of the judicial power. The Act as construed below completely deprives the courts of that fundamental right and provides for a complete delegation of the judicial power of the courts to arbitrators.

The question may be approached from the other point of view, that is, as an attempt to vest judicial power in some body other than the Court. Viewed from that standpoint, the Act is invalid because all judicial power, under the Constitution, must be vested in courts duly created in accordance with its provisions.

It is too clear for argument that an arbitrator is not a court within the meaning of the language of the Constitution.

As we understand the decision of the Circuit Court of Appeals, the above propositions are not controverted, but the Court attempted to show that they have no application to the provisions of the Arbitration Act.

The Circuit Court of Appeals has said that arbitration is directed merely to the remedy, and that the Act,

being a procedural statute, was within the power of Congress to enact.

There is no question but that arbitration does go to the remedy.

But the decision of the Court below goes even further and holds that under the Constitution, the inferior federal courts are purely the creatures of Congress and that the latter, having the power to regulate procedure, may deprive those courts of the power to hear and determine upon the ground that such legislation relates merely to procedure.

If this view is correct, then Congress may provide that in all jury trials, at common law, the jury shall sit alone without the presence or guidance of the judge, or that some person other than a judge may preside upon those trials.

If Congress has this broad power, as asserted by the Circuit Court of Appeals, then Congress can provide that every admiralty suit shall be referred to a commissioner to hear and determine.

If this contention is true, Congress may go even further and may provide that every admiralty suit or every equity suit brought in the Southern District of New York, shall be referred to the Grain Committee of the New York Produce Exchange, to hear and determine.

Unquestionably, Congress may regulate the procedure of the courts in some respects, but that right is not without limit. It may not, under the guise of a statute relating to procedure, deprive the courts of their judicial power.

The decision of the Court below is that the judges of the inferior federal courts derive all of their powers from Congress and that the latter may deprive them of the power to hear and determine and convert them into purely ministerial or clerical officers whose sole duty is to enter a decree, upon the determination of some other body.

This view seems to be in direct conflict with the provisions of Section 1 of Article 3 of the Constitution that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time establish.

It must be conceded that the power to hear and determine goes to the very foundation of the judicial power and taking away the power to hear and determine the judicial power becomes completely destroyed.

The Court below attempts to sustain its conclusion by referring to the decisions of this Court holding that while the Constitution provides that the federal courts shall have jurisdiction over certain classes of cases, that provision is dormant until Congress acts and the federal courts have only such jurisdiction as Congress grants.

The case of *Jackson* v. *Steamboat Magnolia,* 20 How. 296, is cited in support of that argument.

There is no question as to the law upon this subject, as it is well settled that the inferior federal courts have only such jurisdiction as Congress may grant to them.

But it by no means follows that when those courts are created by Congress, that the latter may deprive them of their judicial power and convert them into purely ministerial officers.

The decision of the Court below upon this point is that Congress has complete power and control over the inferior federal courts.

This view presupposes that those courts derive no powers whatsoever from the Constitution.

That theory is, we submit, unsound and not in accordance with the law.

It is true that the establishment of the inferior federal courts and their jurisdiction are solely within the power of Congress, but we submit that when those courts are created by Congress, they are automatically vested with the ju-

dicial power under the provisions of Section 1 of Article 3 of the Constitution, and while Congress may fail to create the inferior federal courts, when created, it cannot deprive them of the judicial power under the Constitution.

In other words, Congress, under the Constitution, has the power to create the inferior federal courts, but when so created, they have a status under the Constitution with which Congress cannot interfere.

The theory of the Court below is that the inferior federal courts derive all their jurisdiction and powers from Congress is not in accordance with the authorities upon this subject.

In *Mayor, etc. of Nashville* v. *Cooper,* 6 Wall. 247, Mr. Justice SWAYNE stated the law upon this subject as follows:

> "As regards all Courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the Court the capacity to take it and an Act of Congress must have supplied it. Their concurrence is necessary to vest it."

That statement was referred to with approval by Mr. Justice SUTHERLAND in *Kline* v. *Burke Construction Co.,* 260 U. S. 226.

The same view has been set forth in the following cases:

United States v. *Burlington & Henderson County, etc.,* 29 Fed. 331;
Harrison v. *Hadley,* 2 Dill. 229, Fed. Cases 6137;
Manley v. *Olney,* 32 Fed. 708;
Schrauger & Johnson v. *Phillips Bernard Co.,* 240 Fed. 131;
In re Hollins, 229 Fed. 349;
Farrell v. *Waterman S. S. Co.,* 291 Fed. 604.

This Court has repeatedly recognized the distinction between the *constitutional* and *legislative* courts.

A full review of the cases, showing the distinction between these two classes of courts, will be found in the opinion in *Ex Parte Bakelite Corporation*, 279 U. S. 438.

The difference in the jurisdiction of these courts, as set forth in the various opinions of this Court, shows that the constitutional courts derive their powers, when created, from the Constitution, while, on the other hand, the legislative courts are subject to complete control by Congress and derive none of their powers from the Constitution.

It is said in the opinion of the Circuit Court of Appeals, as follows:

> "The validity of a clause providing arbitration under the New York Arbitration Act was held no constitutional impediment in the Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109."

That case arose under the arbitration laws of the State of New York and does not concern the Federal Arbitration Act at all. We find nothing in the opinion sustaining the statement that this Court held that there was no constitutional impediment against an arbitration clause. That case concerned only the question whether an arbitration could be had under the New York statute in the courts of that State upon a maritime contract. The Court of Appeals of New York held that such contracts fell exclusively within admiralty jurisdiction, but this Court, reversing the Court of Appeals, held otherwise.

POINT III.

The Court below erred in holding that Congress had the power to enlarge the jurisdiction of the admiralty courts, by conferring upon them the equitable power of specific performance.

Section 4 of the Arbitration Act provides that where any party aggrieved by the failure or refusal of another to arbitrate under a written provision for arbitration that he may, amongst other things, petition a court in admiralty which would have jurisdiction of the subject matter of the controversy, for an order directing that the arbitration shall proceed in the manner provided for in such agreement and that the Court, after hearing, may grant an order to that effect.

Section 8 of the Act provides that in admiralty actions, where there has been a seizure of the vessel in rem or an attachment of the property of the respondent, that "the court shall then have jurisdiction to direct the parties to proceed with the arbitration."

The power to enforce specific performance of a contract is certainly one which is not vested in a court of admiralty, under the well established law as to its jurisdiction.

While the admiralty courts may apply equitable principles in cases falling within their jurisdiction, yet they have not the characteristic powers of a court of equity.

The Eclipse, 135 U. S. 599.

They cannot enforce specific performance of a contract.

Kynoch v. *The S. C. Ives,* New. 205; Fed. Cases No. 7958;

Red Cross Line v. *Atlantic Fruit Co.,* 264 U. S. 109.

The Court below, however, has sustained the power of an admiralty court to enforce specific performance by saying as follows (fol. 241):

> "The Act does not deprive the District Court of jurisdiction, but it seems to enlarge that jurisdiction so as to embrace the enforcement of arbitration agreements not only by ordering such arbitration to proceed, but by entering a decree upon this award."

This statement is in direct conflict with the uniform decisions of this Court that Congress cannot enlarge the jurisdiction of the courts of admiralty and that the determination of what matters fall within the jurisdiction of the court of admiralty, is a purely judicial question.

The law upon this subject is stated as follows by Mr. Justice BRADLEY in *The Lottawanna,* 21 Wall. 558:

> "The question as to the true limits of maritime law and admiralty jurisdiction is, undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no state law or Act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received, as law in the maritime usage of this country, and on such legislation as may have been competent to affect it."

A similar statement of the law was made by Mr. Justice HOLMES in *The Black Heath,* 195 U. S. 361.

It is said in the opinion of the Court below as follows:

> "A power under S. 8 to enforce specific performance in a contract is but a remedy incident to jurisdiction under the Act. (Hartford Accident v. Southern Pacific, 273 U. S. 277; Morse Dry Dock v. Northern Star, 271 U. S. 552.)"

There is nothing in the decisions of this Court in those cases supporting the contention that a court of admiralty has power to enforce specific performance as a remedy incident to its jurisdiction.

The case of *Morse Dry Dock Company* v. *Northern Star, supra,* involved only the construction of the Preferred Mortgage Act, and largely the question of relative priority of preferred mortgages and liens.

The constitutionality of the Preferred Mortgage Act was not even suggested in the case. Its constitutionality is still open to question. It is unnecessary at this time to enter into any discussion of its constitutionality, but in view of the previous decisions of this Court upon the subject, the constitutionality of some of its provisions is subject to grave doubt.

Nor is there anything to be found in the decision in the *Hartford Accident* case, *supra,* which supports this theory that specific performance is only a remedy incident to jurisdiction.

That case was one of limitation of liability. This Court held that a court of admiralty, in working out its jurisdiction, aequired the right to marshal all claims and that upon dismissing the petition, it might, at its discretion, retain jurisdiction over the whole subject matter. But we find nothing in the case which supports the theory propounded by the Court below.

Probably the latter had in mind the right to grant an injunction in limitation proceedings, restraining claimants from bringing suit elsewhere than in the court in which the limitation proceeding is pending.

But that provision does not empower an admiralty court to enforce specific performance as an incident to its jurisdiction.

This Court long ago held that a proceeding for limitation of liability is within the constitutional grant of power

to Congress to establish courts of admiralty and maritime jurisdiction.

Norwich & N. Y. Transportation Co. v. Wright, 13 Wall. 104.

As this Court held that the limited liability law was within the power of Congress to enact, the provision for an injunction was one only for the protection of the jurisdiction of the Court. In such proceedings, a monition issues against all parties to bring their claims into the limitation proceedings.

Every Court, including a court of admiralty, has inherent power to punish for contempt and the injunction issued in the limitation proceedings is merely notice to all parties that they must bring their claims within the admiralty and not elsewhere and that they shall be subject to contempt if they act otherwise.

POINT IV.

The Court below erred in holding that the provisions of Section 8 of the Act are independent of the other sections of the Act, instead of construing the Act as a whole, and, it especially erred because Section 8 of the Act has no application to this case.

It was contended by the petitioner in the Court below that as the contract in this case was for intrastate carriage, only, the Act had no application, under the provisions of Section 1.

The Court held otherwise, however, and said as follows (p. 245):

> "But Section 8 provides, as the basis of jurisdiction, an admiralty cause of action, including libel,

> and seizure, and it declares such basis of jurisdiction to be independent of the provisions of the Act 'notwithstanding anything herein to the contrary.' "

It is also said in the opinion of that Sections 4 and 8 make no reference to Section 1.

The petitioner also contended that no decree could be entered under Section 9 of the Act, which provides that a decree can be entered upon the award only where the parties have so stipulated in their agreement.

This effect of the provisions was of Section 9 was fully argued in the Court below, both in the brief and orally, but it is not referred to in the decision. Presumably the Court ignored that argument upon the same ground, namely, that the proceedings in this case in admiralty were governed solely by the provisions of Section 8 and that the provisions of no other section apply, except possibly those of Section 4.

The construction which the Court below placed upon the provisions of Section 8 is, we submit, contrary to the well established principles of statutory construction.

It is a cardinal principle that a statute shall be construed as a whole and that its various sections shall be harmonized if possible.

This point was raised in *Zip Manufacturing Co.* v. *Pep Mfg. Co.*, 44 Fed. (2nd) 184, decided by NIELDS, District Judge of the District of Delaware. That was a patent case and a motion was made for arbitration, which was denied. It was held that all sections of the Act should be considered together and harmonized, if possible, and that no arbitration could be ordered, except in cases falling within Sections 1 and 2 of the Act.

But Section 8 itself cannot be properly construed as has been done by the Court below, namely that it declares that the basis of jurisdiction shall be independent of the

other provisions of the Act "notwithstanding anything herein to the contrary."

The purpose of Section 8 is clear enough and shows that it does not create a system of procedure in the admiralty, independent of all the other sections of the Act. Section 8 was intended to give to a litigant in an admiralty court, having jurisdiction, the right to those remedies which are peculiar to the admiralty, namely, the seizure of the vessel in an action in *rem*, or the attachment of the property of the respondent, where such an attachment would properly lie.

Section 8 does not declare, as the Court below held that it is independent of the other provisions of the Act but it only declares that the libellant shall have the right of seizure and action in *rem* or attachment of the property of the respondent, and no more, and the words "notwithstanding anything herein to the contrary" mean no more than that the right to admiralty process shall remain, notwithstanding any provision in the Act supposedly to the contrary.

But the Court below overlooked the fact that Section 8 has no application to this case whatsoever.

It would be assumed from reading the opinion of the Court below that the tug *Fagan* was a party to the arbitration proceedings and that a decree had been entered against it and its stipulator, but the facts are directly to the contrary, as the Court ordered arbitration only as against the Marine Transit Corporation, in the suit in *personam*.

Section 8 has no application whatsoever to proceed in *personam* in the admiralty. Its provisions are quite clear and are susceptible of no other construction than that they relate only to proceedings in *rem* or proceedings in *personam* where there has been an attachment of the property of the respondent.

There was no attachment of the property of the Marine Transit Corporation, under the libel against it in *personam*, and the provisions of Section 8 had no application to the proceeding against it in *personam*.

As the provisions of Section 8 have application only in proceedings *in rem* and to cases where there is an attachment of the property of the respondent, the District Court had no power under that section to make an order for arbitration of the proceeding against the Marine Transit Corporation, in *personam*.

Under the provisions of Section 4 of the Act, the party aggrieved by the alleged failure or neglect to arbitrate in a written agreement, may petition any court of the United States, which save for such agreement would have jurisdiction under the judicial code at law, in equity or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration shall proceed and the Court, after hearing, may so direct.

Except, therefore, as provided in Section 8, the Act nowhere provides for the granting of an order of arbitration in a pending suit.

Consequently, as the action in *personam* against the Marine Transit Corporation was not covered by the provisions of Section 8, the Court was without power to grant the arbitration in the suit and the libellants' only method of obtaining arbitration, under the terms of the Act, was by an independent proceeding by petition under the provisions of Section 4.

POINT V.

The decision of the Circuit Court of Appeals is in direct conflict with the terms of the Arbitration Act, which provides in Section 9 that a judgment may be entered upon the award of arbitrators only, if the parties have so agreed by their contract for the arbitration.

Section 9 of the Arbitration Act provides that judgment may be entered upon the award of the arbitrators only "if the parties in their agreement have agreed that a judgment of the Court shall be entered upon the award."

There was no agreement of that kind in this case, as the contract provided for no more than the arbitration of disputes under the contract (fol. 596).

This question was fully argued in the Circuit Court of Appeals, both orally and in the brief, but notwithstanding its importance in the case, it is not even referred to in the opinion.

It is to be assumed, therefore, that the point is ignored in the opinion because of the conclusion of the Court referred to in the previous point, namely, that as the provisions of Section 8 of the Act create a complete system for the application of the Act in admiralty proceedings, it therefore is to be read independently of all of the other sections of the Act, and consequently that the provisions of Section 9 did not apply to admiralty proceedings.

As that point has already been fully considered, it is unnecessary to elaborate upon it here.

We may point out, however, that if this proposition of the complete independence of Section 8 of the Act is sound, then an anomalous condition results.

If the libellants had brought suit at law against the Marine Transit Company upon the contract involved in

this case, no judgment could have been entered upon the award under the provisions of Section 9 because the parties did not stipulate that judgment should be entered upon the award of the arbitrators.

According to this theory of the Court below, the libellants are entitled to have a decree entered herein in an action in admiralty when one could not have been entered in an action at law.

Certainly neither Congress nor the framers of the Act contemplated a result of that kind.

POINT VI.

The decision of the Court below that an admiralty court has jurisdiction to enforce an arbitration of a contract for intrastate carriage is erroneous because under Section 1 of the Act, the courts have jurisdiction only over maritime transactions and contracts involving either interstate or foreign commerce.

The contract here was for intrastate carriage only.

This point raises the same question which is involved in some of the other points, namely, whether the provisions of Section 8 are entirely independent of the provisions of all other sections of the Act, because not specifically referred to in it, or whether its provisions must be read in connection with the other sections.

The following statement is made in the opinion of the Circuit Court of Appeals:

> "The parties claiming to be aggrieved at bar were the appellees as they applied under S. 8 of the arbitration act because of the appellant's failure, neglect or refusal * * * to arbitrate under a written agreement for arbitration (S. 4) and nothing in either section 4 or 8 confines such written agreements for arbitration to agreements involving maritime transactions in a limited sense."

This decision of the Court is contrary to the decision of NIELDS, *D. J.* (District of Delaware), in *Zip Mfg. Co.* v. *Pep Mfg. Co.*, 44 Fed. (2d) 184, to which reference has been made already.

It was there held by the Court that all sections of the Act were to be construed together and harmonized if possible and that no arbitration could be ordered except in cases falling within the terms of Sections 1 and 2 of the Act.

Section 1 of the Act defines maritime transactions as "charter parties, etc." or any other matters in foreign commerce, which if the subject of controversy, would be embraced within admiralty jurisdiction. In that section, commerce is defined as meaning interstate or foreign commerce. Neither of these sections apply to purely intrastate transactions or commerce.

Although the Court below has found that the provisions of Section 1 have no bearing whatsoever in admiralty actions under Section 8, the opinion further proceeds to consider the question whether or not this contract fell within the provisions of Section 1.

It is said in the opinion of the Circuit Court of Appeals, as follows:

> "But it is said that the grain was not established to be for foreign shipment."

We have made no such contention. What we did argue was that the contract made between these parties was for intrastate carriage and that under the provisions of Section 1, the question was as to the character of the contract and not the nature of the shipment.

The facts of the case are very simple and may be briefly restated.

The grain which was lost was carried from Fort William, Ontario, to Buffalo by lake steamer, which arrived at Buffalo about July 24th, 1928. There is no evidence of any through bill of lading in the case.

The steamer carrying the cargo to Buffalo issued a local lake bill of lading.

The grain was stored in the American elevator at Buffalo on July 28, 1928 (p. 164), and nearly three weeks later, on August 17, 1928, Dreyfus & Co. and the Marine Transit Corporation entered into a contract for the carriage of 200,000 bushels of wheat from Buffalo to New York.

The contract made was for purely intrastate carriage from Buffalo to New York (p. 147), and a bill of lading was issued by the Marine Transit Corporation for the carriage of the cargo which was lost, to New York (p. 163).

It may well be that for certain purposes, that this shipment so far as concerned Dreyfus & Company, was a foreign one, but that fact has no bearing upon the right to arbitration under the provisions of the Act because it confers power to enforce arbitration only where the contract made between the parties relates to foreign or interstate commerce.

The nature of the shipment has no connection whatsoever with the right to arbitration under the Act.

It is also said in the opinion that the Barge Canal was a waterway for foreign commerce. There is no question about that fact, but it has no bearing whatsoever upon the right to arbitration under the Act. That concerns only the admiralty jurisdiction.

POINT VII.

The Court below erred in holding that execution should issue against the stipulator for the tug, although no decree was entered against the tug, is clearly erroneous and is in conflict with the uniform law upon the subject.

The statements in the opinion of the Circuit Court of Appeals as to the proceedings are misleading. It might be inferred from those statements that the tug *Fagan* was a party to the arbitration proceedings, which was not a fact.

The opinion also fails to make clear that the Marine Transit Corporation appealed in two different capacities, first, from the decree against it in *personam,* and second, as claimant of the tug *Fagan.* The latter appeal related to the decree of the District Court that execution should issue against the stipulators for the tug.

The tug *Fagan* was sued in *rem.* A stipulation for its value in the sum of $26,000.

Libellant made a motion to refer the issues as to the Marine Transit Corporation, in *personam,* and the tug *Fagan* in *rem,* to arbitration. The Court granted the motion only as to the Transit Corporation, in *personam,* and denied it as to the tug. The arbitration, therefore, proceeded against the Marine Transit Corporation in *personam* only. The arbitration was had as to it only. The award was against it only. The Court, in confirming the award, entered a decree against it only.

But, nevertheless, the Court, by its decree, directed that execution should issue against the stipulator for value of the tug, although the tug was not a party to the arbitration proceeding, nor was there any decree against it.

This portion of decree violates not only the uniform practice of the admiralty, but all of the well-established

principles of law. Nothing is better settled than that a stipulator or surety is liable only for the default of its principal.

In this case, the principal of the stipulator was the tug *Fagan* and its liability has never been adjudged in any way whatsoever, nor has any decree been entered against it.

The Court says in the opinion that the libel and seizure was a proceeding in *rem*, which it undoubtedly was, but that does not alter the situation as the action in *rem* was never tried.

It is said in the opinion of the Circuit Court of Appeals that the stipulation given for the release of the tug was a substitute for the vessel which made the stipulation liable to the exercise of every authority in the power of the Court which it could exercise if the *res* was still in the Court's custody.

There is no question about this principle of law, but it has not the slightest application to the facts of this case. If no stipulation had been given for the release of the tug and it had remained in the custody of the Court, the latter would have been powerless to enter any decree against it without hearing and determination of its liability.

The law and practice upon this subject are too well established to require much discussion.

In actions in *rem*, the final decree runs against the vessel with provision for execution against the stipulator for its release. (See form Benedict's Admiralty, Vol. 2, pp. 490-491.)

No decree can be entered against the claimant of a vessel, personally, but if he has signed the stipulation, he is, of course, liable upon it.

Atlantic Mut. Ins. Co. v. *Alexandre*, 16 Fed. 379.

It so happens in this case that the Marine Transit Corporation, which was sued in *personam*, was also the owner

of the tug *Fagan* and made claim for it. But that does not alter the situation. It had two distinct identities in the case.

The stipulator cannot be bound except by the terms of his stipulation, and by the stipulation it did not agree to pay upon default of the Marine Transit Corporation. It agreed to pay only in the event of a final decree against the tug *Fagan* and there has been none.

The opinion of the Circuit Court of Appeals indicates a misapprehension of the facts of the case, and if there was any such misapprehension, it was removed at the conference with MANTON, *J.* But as shown by his letter of May 20, 1931, to counsel, the error still remains.

There was one statement in the opinion apparently relating to this point to which attention is called because it shows an erroneous impression as to arbitration under the Act.

It is said in the opinion as follows (Rec., p. 244):

> "Section 8 of the Arbitration Act contemplated that the liability arbitrated between the parties was a liability that attached to the tug as well as to the owner in personam."

In other words, this is a decision that notwithstanding the District Court declined to submit the issue as to the tug's liability to arbitration because it was not a party to the contract, nevertheless the tug was a party to the arbitration proceedings.

The fallacy of this decision is so obvious that it requires no consideration.

It is true that Section 8 of the Arbitration Act covers arbitration where there is a proceeding in *rem* against a vessel.

But the construction of that section by the Circuit Court of Appeals apparently is that the courts have power

to order arbitration in any case in *rem* in admiralty whether any agreement for arbitration exists or not.

Clearly the Act cannot be given any such construction.

Owing to the fact that there are different underwriters involved in this case, the decree providing that execution should issue against the stipulator of the tug, has created a situation of confusion. This confusion should be removed by the application of the proper principles of law, and it is submitted that as this error has not been corrected below, that it should be corrected by this Court.

POINT VIII.

The Court erred in holding that it was not necessary that the award should be signed by all the arbitrators.

The arbitration was had before five members of the Grain Committee, including Mr. Walter Trapp (p. 30). Mr. Trapp did not sign the award (p. 166).

The Act contains no provision upon this subject although the Arbitration Act of the State of New York, which we understand was largely followed in the preparation of the Federal Act, does contain a provision that a majority of the arbitrators may make an award.

With this provision of the New York statute before them, the framers of this Act inserted no similar provision and it is a fair presumption, therefore, that they intended that the award of the arbitrators should be unanimous.

It is said in the opinion of the Court below, that it is not necessary that the award should be unanimous and that "a committee of four out of five signed the award" (Rec., p. 242).

Aside from any inference that it was the purpose of Congress to require unanimity of award, we submit that in

the absence of any provision on the subject, unanimity is necessary.

A board of arbitrators is very similar to a jury and in the absence of any provision on the subject in the Arbitration Act, it is to be fairly assumed that Congress intended that the award of arbitrators, like the verdict of a jury, should be unanimous.

This question is not judicial, but legislative.

As Congress did not provide that the award need not be signed by all the arbitrators, the courts can not declare otherwise.

LASTLY.

It is respectfully submitted that the decree below should be reversed.

HORACE L. CHEYNEY,
Counsel for Petitioner.

APPENDIX.

THE UNITED STATES ARBITRATION ACT

Act of Congress, February 12, 1925, C. 213, Sec. 41, Title 9, U. S. Code of Law.

An Act to make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED:

Section 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title.

"Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Sec. 2 Validity, irrevocability and enforcement of agreements to arbitrate.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Sec. 3. Stay of proceedings where issue therein is referable to arbitration.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Sec. 4. Failure, etc., to arbitrate under agreement, petition to United States Court having jurisdiction to compel arbitration; notice and service thereof; hearing and determination.

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States

which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for the service of summons in the jurisdiction in which the proceeding is brought. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. PROVIDED, That the hearing and proceedings under such agreement shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceed-

ing thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Sec. 5. Appointment of arbitrators or umpire.

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avoid himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

Sec. 6. Application heard on motion.

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

Sec. 7. Witnesses before arbitrators; fees; compelling attendance.

The arbitrators selected either as prescribed in this Act or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such atten-

dance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States court and for the district in which such arbitrators, or a majority of them, are sitting, may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner now provided for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

Sec. 8. Proceedings began by libel in admiralty and seizure of vessel or property.

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, not withstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

Sec. 9. Award of arbitration; confirmation; jurisdiction; procedure.

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the

court, then at any time within one year after the award is made any part to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in the next two sections. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a non-resident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the Court.

Sec. 10. Same; vacation; grounds; rehearing.

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause show, or in refusing to hear evidence pertinent and ma-

terial to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the times within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Sec. 11. Same; modification or correction; grounds; order.

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration:

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

Sec. 12. Notice of motions to vacate or modify; service; stay of proceedings.

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a non-resident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

Sec. 13. Papers filed with order on motion; judgment; docketing; force and effect; enforcement.

The party moving for an order confirming, modifying or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk;

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to conform, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

Sec. 14. Citation of title.

This Act may be referred to as "The United States Arbitration Act."

Sec. 15. Contracts not affected.

All Acts and parts of Acts inconsistent with this Act are hereby repealed, and this Act shall take effect on and after the 1st day of January next after its enactment, but shall not apply to contracts made prior to the taking effect of this Act.